83-1604

Office - Supreme Court, U.S.
FILED
MAR 26 1984
ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

FRANKLIN STONE PRODUCTS, INC.,
Petitioner,
V.
J. DALE DAWSON, MARGARET OSMUNDSEN,
ELMER F. GERAGHTY, CLAIRE C. GERAGHTY,
AND EVALYN LEONARD,
Respondents.

On Writ of Certiorari
To the Court of Appeals, District I
Of the State of Wisconsin

PETITION FOR WRIT OF CERTIORARI

Leonard W. Schulz
Attorney at Law

W230 S8775 Clark Street
P.O. Box 156
Big Bend, Wisconsin 53103
(414) 662-3100

Attorney for Petitioner,
Franklin Stone Products, Inc.

QUESTIONS PRESENTED

May a trial court and a court-appointed receiver deprive a corporation placed under receivership for dissolution purposes of its due-process rights under the Fourteenth Amendment of the United States Constitution by taking the below-listed actions when said corporation is appealing the very order appointing a receiver and ordering dissolution of the corporation?

These actions are as follows:

1. The receiver's discharging corporate counsel prosecuting the appeal;
2. The receiver's dismissing said appeal voluntarily on behalf of the corporation;
3. The trial court's refusing to allow corporate counsel to appear in that court on behalf of the corporation during the pendency of the appeal on receivership administration matters.

Note Regarding Other Parties:

In addition to those parties listed in the caption of this petition, the original action in the trial court contained two additional parties named as third-party defendants which are listed as follows: Lannon Stone Products Corp. and Rita Kluth. Their respective involvement in the action is explained in the Statement of the Case. The complaint against such parties was dismissed by the trial court in its order of January 10, 1983, and they have not been active in the appellate litigation in this case.

Also, the receiver, Attorney Theodore J. Hodan, while not a party in the case, has played an active role in the appellate litigation, as discussed in this petition.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Constitutional Provision Involved	2
Statement of the Case	2 - 6
Reason for Granting the Writ	6 - 9
Review by This Court Is Required to Determine Whether a Solvent Corporate "Person" Placed in Receivership Is Entitled to Due Process of Law Under the Fourteenth Amendment of the United States Constitution	6
Conclusion	9
Appendix	
Order of Wisconsin Supreme Court, January 10, 1984	A - 1
Decision and Order of Wisconsin Court of Appeals, November 7, 1983	B - 1
Decision and Order of Wisconsin Court of Appeals, September 13, 1983	C - 1
Letter of Discharge	D - 1
Notice of Voluntary Dismissal	E - 1
Objection to Voluntary Dismissal	F - 1
Excerpts from Brief of Franklin Stone Products, Inc., July 7, 1983	G - 1
Memorandum Re Authority Matter	H - 1
Excerpts from Transcript of Hearing before Trial Court, March 30, 1983	I - 1
Excerpts from Petition for Review Filed with Wisconsin Supreme Court	J - 1
Appraisal by John A. Holzhauer	K - 1
Appraisal by Spiegel-Olson & Associates	L - 1

CITATIONS

Page

Cases

Adamson v. California,
322 U.S. 46, 67 S.Ct. 1672, 91 LEd. 1903 (1947) 7
Bartelt v. Smith,
145 Wis. 31, 129 N.W. 782 (1911) 7
Duncan v. Louisiana,
391 U.S. 145, 88 S.Ct. 1444, 20 LEd. 2d 491 (1968) 7
Goldberg v. Kelly,
397 U.S. 254, 90 S.Ct. 1011, 25 LEd. 2d 287 (1970) 8
Milwaukee & M.R. Co. v. Souter,
69 J.S. 510 (1864) 7

Constitutional Provision

Fourteenth Amendment, United States Constitution 2,6,7

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

FRANKLIN STONE PRODUCTS, INC.,

Petitioner,

v.

J. DALE DAWSON, MARGARET OSMUNDSEN,
ELMER F. GERAGHTY, CLAIRE C. GERAGHTY,
and EVALYN LEONARD,

Respondents,

On Writ of Certiorari
To the Court of Appeals, District I
of the State of Wisconsin

PETITION FOR WRIT OF CERTIORARI

The petitioner, Franklin Stone Products, Inc., prays that a Writ of Certiorari issue to review the decision and order of the Wisconsin Court of Appeals, District I, entered in this action on November 7, 1983. A petition to review that decision was denied by the Wisconsin Supreme Court in an order entered on January 10, 1984.

OPINIONS BELOW

The decision and order of the Wisconsin Supreme Court, dated

January 10, 1984, is unpublished and reproduced in the Appendix to this petition at A-1. The decision and order of the Wisconsin Court of Appeals, District I, dated November 7, 1983, is unpublished and reproduced in the Appendix to this petition at B-1.

JURISDICTION

The decision and order of the Wisconsin Court of Appeals District I, was entered on November 7, 1983. A timely petition for review by the Wisconsin Supreme Court was denied on January 10, 1984, thereby exhausting all state judicial remedies, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. SS 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment of the United States Constitution states in part:

> " . . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

An action for the dissolution of Franklin Stone Products, Inc., was commenced as Milwaukee County Circuit Court Case No. 561-943 by the corporation's minority shareholders, J. Dale Dawson and Margaret Osmundsen, in September of 1981. Claims of mismanagement by the corporation's directors, Elmer F. Geraghty, Claire C. Geraghty, and Evalyn Leonard, and officers, the Geraghtys, were alleged in the complaint. The directors were named as defendants in the suit as well as the corporation. The Geraghtys also are the majority shareholders in Franklin Stone Products, Inc. Elmer F. Geraghty is the founder of the appellant corporation, is eighty-two years of age, and has the equivalent of an eighth-grade education; his wife Claire C. Geraghty, is sixty-nine years of age; and Evalyn Leonard is sixty-seven years of age. Dawson and Osmundsen, who are related as brother and sister, own a competing quarry business.

Franklin Stone Products, Inc., answered the complaint, denying all allegations and counterclaimed alleging among other things, harrass-

ment, malicious injury, and violation of fiduciary duty on the part of Dawson and Osmundsen. A third-party complaint was filed by the corporation in May, 1982, alleging tortious conduct by a former corporate employee, Rita Kluth, and the competing business owned by Dawson and Osmundsen, Lannon Stone Products, Inc. The directors, as individuals, were represented by the law firm of Quarles and Brady until said firm's withdrawal on January 13, 1983. This action was scheduled to go to trial before a jury on January 17, 1983, in Circuit Judge Patrick J. Madden's court, and a pretrial conference was scheduled for January 10, 1983.

Franklin Stone Products, Inc., was engaged in the business of quarrying, and naturally, substantial machinery and land comprised its corporate assets. The corporation was certainly a very solvent entity at all times. (App. at K-1, L-1) During the course of their representation of the directors, Quarles and Brady arranged for an appraisal of certain assets owned by Franklin Stone Products, Inc. This appraisal was performed in May, 1982, by Spiegel-Olson and Associates of Milwaukee, and such appraisal valued the entire business enterprise of the corporation at $800,000.00 (App. at L-1)

At some point prior to the January 10, 1983, hearing before Judge Patrick J. Madden, an offer to purchase most of the corporate assets of Franklin Stone Products, Inc., by Vulcan Materials Co. for $1,620,000.00 was secured. This offer was presented to the Geraghtys on Friday, January 7, 1983, at a meeting at the offices of Quarles and Brady. Mr. Quinn Martin of Quarles and Brady advised the Geraghtys to keep the offer confidential.

On January 10, 1983, a pretrial conference was held in Judge Madden's court, at which time the possibility of settlement was discussed among the various attorneys. Upon the advice of their counsel, Quarles and Brady, and having relied upon the appraisal procured by said counsel, the Geraghtys, who were present in court, assented to a stipulation in a hearing before the court whereby the parties agreed to sell most of the corporate assets of Franklin Stone Products, Inc., within thirty days of January 10, 1983, to Vulcan Materials Co., or a higher bidder, for the sum of $1,620,000.00, or more. All claims, counterclaims, and third-party claims were dismissed. The terms of the stipulation called for Vulcan's offer to be kept confidential. Judge Madden's written order entered January 17,

1983, made effective nunc pro tunc, as of January 10, 1983, reflected these proceedings.

By letter of January 13, 1983, Quarles and Brady withdrew as counsel for the directors as individuals under circumstances where the appearance of a conflict of interest was present. Quarles and Brady had previously represented Vulcan Materials Co. and had contacted them in an effort to determine whether they were interested in purchasing Franklin Stone's assets. Thereafter, the law firm of Frisch, Dudek and Slattery, Ltd., was retained by the directors to represent them in this matter. Attorney Edward Dudek arranged to have Holzhauer Realtors and Appraisers perform a new appraisal of Franklin Stone's assets. This second appraisal revealed that the original appraisal had failed to consider the value of the limestone deposits of the quarry assets of the land owned by Franklin Stone Products, Inc., and the value of the approximately 165 acres owned by Franklin Stone Products, Inc., at its home office location was appraised at almost $3,000,000.00 alone, exclusive of machinery and substantial real estate holdings elsewhere. (App. at K-1)

Presented with such a gross mistake in the appraisal procured by the former counsel, attorneys for the directors moved to have the stipulation and order of January 10, 1983, and the written order of January 17, 1983, set aside, since the Geraghtys had relied on an incorrect appraisal in giving their consent to the stipulation. The order of the trial court dated March 8, 1983, rejected this motion and granted, with some modifications, the plaintiffs' motion to enforce the stipulation and order. A later motion brought on March 21, 1983, by Franklin Stone's new corporate counsel, Leonard W. Schulz, to vacate the prior stipulation and orders of the Court of January 10, 1983, and January 17, 1983, and March 8, 1983, on the basis of a mistake under Wis. Stats., Sec. 806.07, and to stay proceedings pending appeal was also denied by the order of the trial court on March 23, 1983.

Franklin Stone Products, Inc., with Attorney Leonard W. Schulz as its corporate counsel, then filed an appeal with the Wisconsin Court of Appeals, District I, No. 83-567, and later amended said appeal to include the order of the trial court dated March 30, 1983, which appointed Attorney Theodore J. Hodan as receiver against the wishes of the corporation, to effect the sale and liquidation of corporate assets owned by Franklin Stone and to manage and conduct the

litigation in Case No. 561-943, and in any other cases on behalf of the defendant, Franklin Stone Products, Inc. A brief and appendix was filed by Franklin Stone on July 7, 1983. Since being appointed as receiver, said receiver has proceeded to liquidate as ordered, has discharged the corporate attorney, Leonard W. Schulz, as counsel for Franklin Stone Products, Inc., and has filed a voluntary dismissal of the corporate appeal, all against the wishes of said corporation. An objection to the voluntary dismissal was filed by Franklin Stone with the Court of Appeals. Furthermore, the trial court has refused to allow discharged corporate counsel to appear in court on behalf of the corporation during the pendency of the appeal. A clear challenge was presented regarding Franklin Stone Products, Inc.'s, fundamental right to seek appellate due process through it's chosen counsel. The actions by the receiver and the trial court have thus formed the subject matter of this appeal.

An objection to each and every action taken by the receiver hereafter, which was made by Attorney Schulz on the record at a hearing before Judge Madden on March 30, 1983, anticipated what was to transpire later. (App. at I-1) Judge Madden also refused to let Attorney Schulz appear for the corporation at March 30, 1983, hearing, while the appeal was pending. (App. at I-1) Shortly thereafter, the receiver discharged Attorney Schulz as corporate counsel and filed a voluntary dismissal purportedly on behalf of Franklin Stone Products, Inc. (App. at D-1, E-1) Objection to this voluntary dismissal was then filed by Attorney Schulz. (App. at F-1) Other activities, such as the failure to serve Attorney Schulz with copies of documents and correspondence, demonstrated the receiver's desire to terminate the corporation's appellate rights.

Franklin Stone's brief on the merits which was filed with the Court of Appeals on July 6, 1983, squarely addressed the deprivation of due process. That portion of the brief is appended hereto at G-1. Because of the ultimate dismissal of the appeal, that brief was never considered by the Court of Appeals. Instead, the Court of Appeals, in its order of September 13, 1983, directed that Attorney Schulz and the receiver file memoranda dealing with what was termed the authority of Attorney Schulz to continue the appeals, in view of his discharge as counsel. (App. at C-1)

In the memorandum filed by Attorney Schulz on behalf of Franklin Stone Products, Inc., the constitutional repugnancy of the actions

of the receiver and the trial court were pointed out as follows:

> "In addition to offending the Wisconsin Constitution, the maneuvers by the receiver and the trial court violate the Fourteenth Amendment of the United States Constitution, which states in part that '. . . nor shall any State deprive any person of life, liberty or property, without due process of law.' "

(The entire memorandum is reprinted in the Appendix, starting at p. H-1.) This argument was rejected and largely ignored by the Court of Appeals in its decision of November 7, 1983, which found that Attorney Schulz had no authority to maintain the appeals and dismissed the same, thereby destroying the exercise of the corporation's appellate rights. (App. at B-1)

A timely petition for discretionary review was then filed with the Wisconsin Supreme Court. This petition again reiterated the deprivation of Fourteenth Amendment due process. (App. at J-1) In its order of January 10, 1984, the Wisconsin Supreme Court denied the petition without comment on the issues raised. (App. at A-1) Having thus been denied relief on a federal question by the court of last resort in the State of Wisconsin, and having properly raised the Fourteenth Amendment issue at its inception, Franklin Stone Products, Inc., by Attorney Leonard W. Schulz now petitions the United States Supreme Court for a writ of certiorari.

REASON FOR GRANTING THE WRIT

Review By This Court Is Required to Determine Whether A Solvent Corporate "Person" Placed in Receivership Is Entitled To Due Process Of Law Under The Fourteenth Amendment Of The United States Constitution.

In the case at hand, the Court is presented with an important and novel constitutional question that should be resolved by the Court — whether a perfectly solvent corporation placed in receivership is entitled to due process of law under the Fourteenth Amendment. The specific process which is being referred to is the right to seek appellate relief from orders of the court which have, among other things, placed the corporate entity in receivership. As the petitioner has argued throughout the course of the appeal, it, like any other person, has a constitutional right to avail itself of that appellate process which the Wisconsin legislature has delineated so as to seek relief

on the merits of its case. Franklin Stone Products, Inc., does not question the sufficiency of the appellate process afforded by Wisconsin law and the U.S. Constitution; the corporation merely asserts that it, too, has a right to seek appellate relief. The Court should settle this matter of important constitutional law.

The actions of the receiver in attempting to discharge Franklin Stone Products, Inc.'s, corporate counsel and in filing a purported "voluntary dismissal" on behalf of the corporation, along with the trial court's refusal to permit corporate counsel to appear in that court on behalf of the corporation during the pendency of the appeal, offend the Fourteenth Amendment's due process clause which states that ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ." The requisite state action necessary to invoke the clause is present, since the Milwaukee County Circuit Court certainly constitutes an arm of the state, and the court-appointed receiver is an officer of that court under Wisconsin law, according to *Milwaukee & M.R. Co. v Souter,* 69 J.S. 510 (1864) and *Bartelt v. Smith* 145 Wis. 31, 129 N.W. 782 (1911).

While the language of the Fourteenth Amendment's due process clause is spacious and undoubtedly meant to be so, the thrust of the interpretive quest has revolved around the questions of how much process is due a person, or if enough process has been afforded, rather than whether any process is due a litigant. Cases such as *Duncan v. Louisiana* 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968) and *Adamson v. California,* 332 U.S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903 (1947), typify the struggle which the Court has had in determining the extent of the process due. Although the approaches proposed as answers in this dynamic have included the total incorporation of the Bill of Rights, selective incorporation of those rights, and the more nebulous selection of those rights necessary for fundamental fairness, the basic assumption underlying all of this debate is that all persons, whether real or legal, are entitled to a system of due process when a taking of life, liberty, or property is going to occur. In view of interpretive history of this amendment, it seems rather obvious that a party is, at least, entitled to use the due process that has already been set forth.

The actions complained of herein, particularly those by the receiver, were undoubtedly designed to destroy the exercise of petitioner's appellate rights. Almost immediately after his appointment as receiver, Attorney Theodore J. Hodan discharged Attorney Schulz as corporate counsel for all purposes. (App. at D-1) From there, it was a small step to make perverse use of the voluntary dismissal provision in Wisconsin's appellate procedure to effectively terminate the corporation's appeal. (App. at E-1) Instead of facing the due process issue squarely, the Wisconsin Court of Appeals, District I, nicely sidestepped that issue and raised a matter never previously at issue — whether Attorney Schulz as counsel for the corporation, prior to the appointment of the receiver, had any authority to maintain the appeals. (App. at B-1) Clearly, the Court's opinion constituted an improper collateral attack on Attorney Schulz's authority, since his authority had never been questioned below. The decision of the Wisconsin Supreme Court in refusing to grant review similarly ignored the real issue. (App at A-1) An aversion to a review of the merits of the petitioner's case has permeated the proceedings below, and the maneuvers employed have provided a convenient way to eliminate the possibility of a decision on the merits.

In addition to the constitutional mandate dictating the due process, it has always been the sound public policy of this nation to afford litigants their day in court. The evolution of due process in the criminal realm, as noted earlier, along with administrative law cases such as *Goldberg v. Kelly*, 397 U.S. 245, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970), bear witness to this fact. By analogy, to a party engaged in civil litigation, the right to seek relief in a court of appeals is just as important from the due process standpoint as, for example, the Miranda rights are to a criminal litigant or the right to a pretermination evidentiary hearing is to a recipient of AFDC. The economic climate of this country can ill afford to have solvent corporations deprived of important legal rights. Simply put, it is bad public policy. In reviewing this petition, the Court should remember that the petitioner was not an entity tottering on the edge of bankruptcy, with intentions of merely using the legal process for meritless delay. Instead, Franklin Stone Products, Inc., was a wealthy corporation with valuable land, mineral deposits, and machinery. (App. at K-1, L-1) The appraisal performed by the Holzhauer firm certainly confirmed such value, having placed the value of the home office

location alone, exclusive of machinery and land at other sites, at approximately $3,000,000.00 (App. at K-1) Thus, the corporation has much at stake in terms of property, and sound public policy dictates that it be allowed to exercise its right to appeal from a decision premised on mistake.

CONCLUSION

The fact that Franklin Stone Products, Inc., has been deprived of its appellate rights by the actions taken below cannot be denied. From the position of the petitioner, such a denial of due process is both constitutionally offensive and violative of sound public policy. Certiorari should be granted to review this matter and to settle an important and novel question of constitutional law regarding the rights of solvent corporations placed in receivership.

Respectfully Submitted,
LEONARD W. SCHULZ
Attorney at Law

W230 S8775 Clark Street
P.O. Box 156
Big Bend, Wisconsin 53103
(414) 662-3100

Attorney for Petitioner
Franklin Stone Products, Inc.

APPENDIX

Office of the Clerk

SUPREME COURT

STATE OF WISCONSIN

TO:

Madison, January 10, 1984

Hon. Patrick J. Madden
901 N. 9th St., Rm. 502
Milwaukee, WI 53233

John H. Niebler
P.O. Box 444
Menomonee Falls, WI 53051

Hunter & Sommers
253 South Street
Waukesha, WI 53186

Eugene A. Kershek
10701 W. National Ave.
West Allis, WI 53227

Leonard W. Schulz
P.O. Box 156
Big Bend, WI 53103

The court today announced an order in your case as follows:

No. 83-567 J. Dale Dawson, et al. v. Franklin Stone Products, Inc., et al.

The court having considered defendant and third-party plaintiff-petitioner Franklin Stone Products' petition for review of an adverse order of the court of appeals, district I, dated November 7, 1983,

IT IS ORDERED the petition for review is denied, with $50 costs.

MARILYN L. GRAVES
Clerk of Supreme Court

DISTRICT I

Office of the Clerk

COURT OF APPEALS
OF WISCONSIN

Marilyn L. Graves
Clerk

Madison, November 7, 1983

TO:

John Niebler
Niebler and Niebler

Eugene A. Kershek

Hon. Patrick J. Madden
Circuit Court Judge

Theodore J. Hodan
Fiorenza, Weiss, etc.

Hunter & Sommers

Leonard W. Schulz

You are hereby notified that the Court entered the following opinion and order:

83-567 Dawson, et al. v. Franklin Stone Products, Inc.

Before Wedemeyer, P.J., Decker and Moser, JJ.

On March 28, 1983, and April 7, 1983, Franklin Stone Products, Inc., by Attorney Leonard Schulz, filed notices of appeal directed to certain orders of the trial court. On March 30, 1983, the trial court appointed a receiver to effect the sale and liquidation of the corporate assets. The order appointing the receiver provides that the receiver "shall represent the corporation in all pending and further legal actions." On March 31, 1983, pursuant to that authority, the

receiver discharged Schulz as counsel for the corporation. The receiver then filed a notice that he was voluntarily dismissing the notices of appeal filed by Schulz. Schulz objected to the voluntary dismissal. We directed Schulz and the receiver to submit memoranda on the issue of whether Schulz had the authority to continue the appeals in spite of his discharge by the receiver.

Schulz contends that, as counsel for the corporation, he has the authority to challenge the appointment of the receiver. He argues that the corporation "has fundamental right to prosecute this appeal using counsel of its own selection." The corporation, however, does not have a mind or will of its own. The business and affairs of a corporation are managed by its board of directors. Sec. 180.30, Stats. The board of directors have the authority to retain counsel to challenge the appointment of the receiver, but Schulz does not allege that he has been retained in that capacity. Furthermore, it appears that the directors have retained Attorney Eugene Kershek in that capacity. In the absence of action by the board of directors, sotckholders could maintain a derivative action pursuant to sec. 180.405, Stats., if they opposed the appointment of receiver. Schulz does not allege that he has been retained by stockholders in that capacity. Schulz has not shown that, as counsel for the corporation, prior to the appointment of the receiver, he has any authority to maintain the appeals.

Upon the foregoing reasons,

IT IS ORDERED that the notices of appeal filed by Attorney Leonard Schulz are dismissed. The brief of co-appellants Elmer F. Geraghty, Claire C. Geraghty and Evalyn Leonard has been filed. The brief of the respondents shall be filed within thirty days of the date of this order.

MARILYN L. GRAVES
Clerk of Court of Appeals

DISTRICT I

Office of the Clerk

COURT OF APPEALS
OF WISCONSIN

Marilyn L. Graves
Clerk

Madison, September 13, 1983

TO:

John H. Niebler
Niebler and Niebler

Leonard Schulz

Eugene A. Kershek

Theodore J. Hodan
Fiorenza, Weiss, etc.

Hunter & Sommers

You are hereby notified that the Court entered the following opinion and order:

83-567 J. Dale Dawson, et al. v. Franklin Stone Products

Before Wedemeyer P.J., Moser and Dykman, JJ.

J. Dale Dawson and Margaret Osmundsen initiated a stockholder derivative action for the dissolution of Franklin Stone Products, Inc. They allege mismanagement on the part of the directors. On January 10, 1983, the trial court entered an order pursuant to a stipulation. The order dismissed all the claims arising from the derivative action and directed the dissolution of the corporation and sale of its assets for $1,600,000.

The directors filed a motion to vacate the January 10 order on the basis that the stipulation had been predicated on an inaccurate

appraisal. The motion to vacate was denied on March 8. A motion to reconsider the March 8 order was denied on March 23. On March 30, the trial court appointed a receiver to effect the sale and liquidation of the corporate assets. Director Evelyn Leonard filed another motion to vacate the January 10 order on the basis that she had not been present in court when the stipulation was entered. Her motion was denied on April 21.

The directors filed notices of appeal directed to the March 8, March 23, March 30 and April 21 orders. Franklin Stone Products, by Attorney Leonard Schulz, filed notices of appeal directed to the March 8, March 23, and March 30 orders. Dawson and Osmundsen have filed a motion to dismiss the appeals on the basis that they are not taken from appealable orders.

Dawson and Osmundsen argue that because the January 10 order was a final order, none of the subsequent orders could have been final orders appealable as of right. The appealability of orders entered on motions to vacate prior appealable orders or judgments depends on whether or not the issues presented in the post-judgment motion could have been reviewed on an appeal from the judgment itself. *Mack v. Joint School District No. 3,* 92 Wis. 2d 476, 485, 285 N.W. 2d 604, 608 (1979). The initial motion to vacate the January 10 order presented an issue which could not have been reviewed in an appeal directly from the January 10 order. That issue concerned the directors' contention that the stipulation had been based on an inaccurate appraisal. The order denying that motion, therefore, is a final order appealable as of right. Whether the subsequent motions to vacate or reconsider (which were denied in the March 23 and April 21 orders) presented issues which could not have been reviewed on appeal from earlier orders should be addressed by the parties in the briefs on the merits.

An additional problem is presented by the notices of appeal filed by Attorney Schulz on behalf of Franklin Stone Products. One of the notices was filed on March 28; the other on April 7. On March 31, however, the receiver discharged Attorney Schulz as counsel for the corporation. The receiver has filed a notice that he is voluntarily dismissing the notices of appeal filed by Attorney Schulz. Attorney Schulz has objected to the voluntary dismissal. An issue appears as to whether Attorney Schulz has the authority to continue with those appeals in view of his discharge as counsel.

Upon the foregoing reasons,

IT IS ORDERED that the motion to dismiss the appeals is denied.

IT IS FURTHER ORDERED that, within seven days of the date of this order, Attorney Schulz shall file a memorandum addressing the issue of whether he has the authority to continue the appeals. The receiver shall file a memorandum in response within seven days of service of the memorandum of Attorney Schulz. Further appellate proceedings are stayed pending disposition of the issues addressed in the memoranda.

MARILYN L. GRAVES
Clerk of Court of Appeals

FIORENZA, WEISS, AMATO, HODAN & BELONGIA, S.C.
Attorneys at Law

DOMINIC S. AMATO
AARON BELONGIA
FRANK W. DOSTER
JOHN A. FIORENZA
Court Commissioner
THEODORE J. HODAN
Court Commissioner
PAUL M. LOHMANN
J. PATRICK RONAN
DAVID B. STEARNS
DANIEL J. WEISS
LAWRENCE G. WICKERT

GREAT AMERICAN BUILDING
5960 WEST BROWN DEER ROAD
MILWAUKEE, WISCONSIN 53223-2382

TELEPHONE
(414) 355-3600

OF COUNSEL
ROBERT L. JACKSON, JR.

March 31, 1983

Attorney Leonard W. Schulz
Box 156
Big Bend, WI 53103

Re: Franklin Stone Products, Inc.

Dear Mr. Schulz:

As you know, on March 30, 1983, while you were present in court Judge Patrick J. Madden appointed me as Receiver for Franklin Stone Products, Inc.; and, the scope of duties of my Receivership were fully set out in the order, a copy of which was given to you. Therefore, please be advised that effective forthwith Franklin Stone Products, Inc. discharges you as its counsel and the undersigned specifically instructs you to perform no legal work of any kind whatsoever on behalf of Franklin Stone Products, Inc.

Very truly yours,

Fiorenza, Weiss, Amato, Hodan & Belongia, S.C.

/s/Theodore J. Hodan

Theodore J. Hodan

cc: Hon. Patrick J. Madden
Atty. John Niebler
Atty. Eugene A. Kershek
Atty. Francis Croak
Atty. Maurice B. Weisfeldt
Court of Appeals, District I

COURT OF APPEALS OF WISCONSIN

DISTRICT I

J. DALE DAWSON and
MARGARET OSMUNDSEN,
Plaintiff-Respondent,

v.

FRANKLIN STONE PRODUCTS, INC.,
Defendant and Third-Party
Plaintiff-Appellant,

ELMER F. GERAGHTY, CLAIRE C. GERAGHTY
and EVELYN LEONARD
Defendants and Co-Appellants

Case No. 83-567

NOTICE OF
VOLUNTARY
DISMISSAL

TO: Marilyn L. Graves
Clerk of Court of Appeals
P.O. Box 1688
Madison, Wisconsin 53701-1688

Franklin Stone Products, Inc., Defendant and Third-Party Plaintiff-Appellant, by its receiver Attorney Theodore J. Hodan, hereby gives notice and moves the Court, pursuant to Wis. Stats. Section 809.18, for an order of voluntary dismissal of the above entitled appeal.

Dated at Milwaukee, Wisconsin, this 17th day of June 1983.

/s/Theodore J. Hodan

Theodore J. Hodan
Receiver for Franklin Stone
Products Inc., Plaintiff-
Appellant

Fiorenza & Hodan, S.C.
Attorneys at Law
5960 W. Brown Deer
Brown Deer, WI 53223
Telephone: (414) 355-3600

COURT OF APPEALS OF WISCONSIN

DISTRICT I

J. DALE DAWSON and
MARGARET OSMUNDSEN,

Plaintiffs-Respondents

v.

FRANKLIN STONE PRODUCTS, INC.,

Case No. 83-567
OBJECTION

Defendant and Third-Party
Plaintiff-Appellant,

ELMER F. GERAGHTY, CLAIRE C. GERAGHTY
and EVALYN LEONARD,

Defendants and Co-Appellants

TO: MARILYN L. GRAVES
Clerk of Court of Appeals
P.O. Box 1688
Madison, Wisconsin 53701

Franklin Stone Products, Inc., defendant and third-party plaintiff-appellant, hereby formally objects to the filing of any notice of voluntary dismissal or other notices by Theodore J. Hodan as receiver for Franklin Stone Products, Inc. The entire thrust of the above-entitled appeal contests the appointment of said receiver, and the actions by the receiver in attempting to dismiss the corporation's appeal of his appointment are ludicrous and foreign to our law. It is suggested that such notices be returned to the sender without action, as any such attempts by the receiver are in themselves responses to the above-entitled appeal.

Dated at Big Bend, Wisconsin, this 20th day of June, 1983.

/s/Leonard W. Schulz

Leonard W. Schulz
Attorney for Franklin Stone
Products, Inc.

P.O. Box 156
Big Bend, Wisconsin 53103
Telephone: (414) 662-3100

vacation of the stipulation and accompanying orders which, if left in place, would permit what amounts to a fire sale of valuable corporate assets.

II. A TRIAL COURT WHICH HAS ORDERED, AMONG OTHER THINGS, THE DISSOLUTION OF A CORPORATION AND A RECEIVER APPOINTED BY THE TRIAL COURT TO FACILITATE SUCH DISSOLUTION MAY NOT FRUSTRATE THE RIGHTS OF SAID CORPORATION BY TAKING THE BELOW-LISTED ACTIONS WHILE THE CORPORATION IS APPEALING, AMONG OTHER THINGS, THE VERY ORDER REQUIRING DISSOLUTION AND APPOINTING SAID RECEIVER. THE ACTIONS ARE LISTED AS FOLLOWS:

a) THE RECEIVER ATTEMPTING TO DISCHARGE CORPORATE COUNSEL PROSECUTING THE APPEAL;
b) THE RECEIVER ATTEMPTING TO DISMISS SAID APPEAL VOLUNTARILY ON BEHALF OF THE CORPORATION;
c) THE TRIAL COURT REFUSING TO ALLOW CORPORATE COUNSEL TO APPEAR IN THAT COURT ON BEHALF OF THE CORPORATION DURING THE PENDENCY OF THE APPEAL.

Due process of law is a fundamental right well established in our legal tradition. The actions taken by the trial court and the receiver in this case blatantly offend this fundamental right, since they attempt to thwart a solid challenge to the orders of the lower court which have placed Franklin Stone Products, Inc., in its present position. What has occurred in this case is an efficient scheme for thwarting the appellant corporation's appeal rights. The receiver and the trial court merely attempt to get rid of the corporation's counsel, Leonard W. Schulz, and then the receiver submits a voluntary dismissal of the appeal purportedly on behalf of the corporation, but in reality against the true wishes of the corporation.

If these stranglehold-type maneuvers are approved by the appellate court, the appellant, Franklin Stone Products, Inc., will have been effectively denied its legal remedy and chosen counsel in the court of appeals. To allow such activity would set a dangerous precedent, in that other corporations placed in receivership would face the same prospect of having their appeal rights harmed, no matter how well-founded their case might be. It goes without saying that sound

public policy would dictate against such activity. Franklin Stone Products, Inc., like other appellants, has a right to appeal from orders of the lower court without having to face the frustrating maneuvers of the receiver and the lower court. Such actions are totally foreign to our legal traditions and due process of law.

COURT OF APPEALS OF WISCONSIN

DISTRICT I

Appeal No. 83-567

J. DALE DAWSON and
MARGARET OSMUNDSEN,

Plaintiffs-Respondents,

vs. MEMORANDUM

FRANKLIN STONE PRODUCTS, INC.,

Defendant and Third-Party
Plaintiff-Appellant,

ELMER F. GERAGHTY, CLAIRE C. GERAGHTY
and EVALYN LEONARD,

Defendants and Co-Appellants.

I. BACKGROUND

This memorandum is being submitted pursuant to the order of the Court of Appeals, District I, dated September 13, 1983, which directed that Attorney Leonard W. Schulz, counsel for the appellant, Franklin Stone Products, Inc., address the issue of whether he has the authority to continue this appeal on behalf of Franklin Stone Products, Inc. Such issue has arisen because of the receiver's purported discharge of Attorney Schulz as counsel for Franklin Stone Products, Inc., followed by the attempted voluntary dismissal filed by said receiver. The appellant has vigorously denied the propriety of these actions, as can be seen upon reviewing the second section of the appellant's brief, a copy of which is attached hereto as Exhibit No. 1, and incorporated by reference. A better way to look at this matter, however, is to consider what authority the trial court and the receiver, Theodore Hodan, have that would empower them to take such extraordinary actions, which, if allowed, would deny Franklin Stone Products, Inc., its day in the appellate court represented by its chosen counsel. As the appellant has argued

throughout the course of this appeal, these activities are both contrary to public policy and offensive to due process.

II. ARGUMENT

The receiver appointed by Judge Madden to liquidate the appellant corporation bases his authority to voluntarily dismiss the appeal on behalf of said corporation on Wisconsin Statutes, Sec. 809.18 which states in part that "an appellant may dismiss an appeal by filing a notice of dismissal." The term "appellant" as defined in Wis. Stats., Sec. 809.01, means "a person who files a notice of appeal." Clearly, the person who filed the notices of appeal in this case, Franklin Stone Products, Inc., by its chosen counsel, Leonard W. Schulz, is not the same person as that attempting to dismiss the appeal on a voluntary basis. The latter person is a court-appointed officer who has taken a position adverse to the corporation in this appeal. The voluntary dismissal statute contemplates the dismissal of an appeal by the party who instituted such a proceeding and later decides not to continue the same on its own volition; this statute does not envision a forced dismissal of an appeal against the wishes of the appellant. Such activity cannot be characterized as "voluntary" in any way, shape or form.

Undoubtedly the receiver will argue that the order of the trial court appointing a receiver gave him the authority to discharge Attorney Schulz, thereby paving the way for a "voluntary" dismissal. This proposition is fallacious, since the very order appointing a receiver is part of the subject matter of this appeal, and very much in dispute at this point. Furthermore, the purported discharge of Attorney Schulz is violative of the role of a receiver, since it does not represent the best interests of the corporation which such receiver should respect. It is only through the prosecution of this appeal by counsel of its choice that Franklin Stone's best interests will be guarded, and that a purchase price more in line with the fair market value of corporate assets can be obtained. A search of Wisconsin case law reveals nothing even remotely addressing the subject, although such a void should not be surprising when one considers that such a scheme is probably novel and certainly violative of fundamental rights.

The most compelling arguments which support the appellant corporation's right to appeal, using its chosen counsel, were presented in the second section of the appellant's brief and will be reiterated and expanded upon here. Sound public policy dictates that this corporation, like all other litigants, is entitled to vigorously prosecute its appeal free of the stranglehold maneuvers which the receiver and the trial court have attempted to impose. To allow this right to be extinguished would set a dangerous precedent for other corporations which are similarly situated in that they, too, could be barred from appeal, no matter how meritorious their case might be.

The actions of the trial court and the receiver are also offensive to due process of law which is a fundamental right well engrained in our legal tradition. The Wisconsin legislature, as a means to provide such due process, has delineated an appellate process in Chapter 809 of the Wisconsin Statutes which is available to litigants. Confirmation of the actions of the receiver and the trial court would effectively deny Franklin Stone Products, Inc., from using this process. Article I, Section 9 of the Wisconsin Constitution states as follows:

> "Every person is entitled to a certain remedy in the law for all injuries, or wrongs, which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws."

As *Metzger v. Wisconsin Department of Taxation,* 35 Wis. 2d, 119, 150 N.W. 2d 431 (1967) and *Neuhaus v. Clark County,* 14 Wis. 2d 222, 111 N.W. 2d 180 (1961) have stated, this constitutional provision guarantees that a litigant shall have his day in a court of competent jurisdiction. It is precisely that day, so to speak, in the appellate court that Franklin Stone Products, Inc., desires and is entitled to, according to the constitution of this state.

In addition to offending the Wisconsin Constitution, the maneuvers by the receiver and the trial court violate the Fourteenth Amendment of the United States Constitution, which states in part that "... nor shall any State deprive any person of life, liberty, or property, without due process of law . . ." The requisite state action necessary to invoke this amendment is present, since the Milwaukee County Circuit Court is certainly an arm of the state and the receiver,

Theodore Hodan, is an officer of the court, according to Milwaukee & M.R. Co. v Souter, 69 J.S. 510 (1864) and Bartelt v. Smith, 145 Wis. 31 129 N.W. 782 (1911). Therefore, the receiver and the trial court cannot deny this appellant the due process which the supreme law of this land guarantees.

III. CONCLUSION

In the final analysis, Franklin Stone Products, Inc., has a fundamental right to prosecute this appeal using counsel of its own selection. The devious methods employed in an attempt to get Franklin Stone Products, Inc., and its chosen counsel, Leonard W. Schulz, out of this appeal should be condemned to the strongest possible extent by the court of appeals. It is one thing for a litigant to have his day in court and win or lose, whatever the case might be, but it is quite another to have the courthouse door barred before one even has the opportunity to present his case after taking all the requisite steps to do so. While the latter situation may be customary in other societies, it is offensive to our notion of justice. The appellant, Franklin Stone Products, Inc., respectfully requests that the appellate court confirm the corporation's right to appeal by its chosen counsel, Leonard W. Schulz, and order that such appeal proceed in due course.

Respectfully submitted,

LEONARD W. SCHULZ
Attorney for Franklin Stone Products, Inc.

P.O. Box 156
Big Bend, Wisconsin 53103
Telephone: (414) 662-3100

vacation of the stipulation and accompanying orders which, if left in place, would permit what amounts to a fire sale of valuable corporate assets.

II. A TRIAL COURT WHICH HAS ORDERED, AMONG OTHER THINGS, THE DISSOLUTION OF A CORPORATION AND A RECEIVER APPOINTED BY THE TRIAL COURT TO FACILITATE SUCH DISSOLUTION MAY NOT FRUSTRATE THE RIGHTS OF SAID CORPORATION BY TAKING THE BELOW-LISTED ACTIONS WHILE THE CORPORATION IS APPEALING, AMONG OTHER THINGS, THE VERY ORDER REQUIRING DISSOLUTION AND APPOINTING SAID RECEIVER. THE ACTIONS ARE LISTED AS FOLLOWS:

a) THE RECEIVER ATTEMPTING TO DISCHARGE CORPORATE COUNSEL PROSECUTING THE APPEAL;

b) THE RECEIVER ATTEMPTING TO DISMISS SAID APPEAL VOLUNTARILY ON BEHALF OF THE CORPORATION;

c) THE TRIAL COURT REFUSING TO ALLOW CORPORATE COUNSEL TO APPEAR IN THAT COURT ON BEHALF OF THE CORPORATION DURING THE PENDENCY OF THE APPEAL.

Due process of law is a fundamental right well established in our legal tradition. The actions taken by the trial court and the receiver in this case blatantly offend this fundamental right, since they attempt to thwart a solid challenge to the orders of the lower court which have placed Franklin Stone Products, Inc., in its present position. What has occurred in this case is an efficient scheme for thwarting the appellant corporation's appeal rights. The receiver and the trial court merely attempt to get rid of the corporation's counsel, Leonard W. Schulz, and then the receiver submits a voluntary dismissal of the appeal purportedly on behalf of the corporation, but in reality against the true wishes of the corporation.

If these stranglehold-type maneuvers are approved by the appellate court, the appellant, Franklin Stone Products, Inc., will have been effectively denied its legal remedy and chosen counsel in the court of appeals. To allow such activity would set a dangerous precedent, in that other corporations placed in receivership would face the

same prospect of having their appeal rights harmed, no matter how well-founded their case might be. It goes without saying that sound public policy would dictate against such activity. Franklin Stone Products, Inc., like other appellants, has a right to appeal from orders of the lower court without having to face the frustrating maneuvers of the receiver and the lower court. Such actions are totally foreign to our legal traditions and due process of law.

MR. HODAN: Yes. Just so it's clear, you mean they will consent to assign their interest in the lease.

MR. WEISFELDT: No, they are accepting the assignment from Franklin Stone Products to the highest bidder.

MR. NIEBLER: Consent is the word.

MR. HODAN: Consent, they will give their consent of the lease to the highest bidder.

MR. SCHULZ: That's when the appellate court stay order is lifted.

THE COURT: At the time the property is sold. Of course the Court stands under the stay order of the Court of Appeals.

As I indicated earlier, the Court has appointed Mr. Hodan as receiver under the settlement agreement and under the Wisconsin Statutes which are appropriate thereto. Appearances have been made in these proceedings by the firms of Kershek & Kershek and Mr. Leonard Schulz. I don't wish to be arbitrary. Mr. Hodan is in charge of the affairs of Franklin Stone Products Corporation and in this court. Now, your appearance in the Court of Appeals is a matter for the Court of Appeals, and I'm sure they know how to handle that very well, but for these proceedings Franklin Stone Products is represented by the receiver appointed by the Court.

MR. KERSHEK: Your Honor, may I be heard for a minute, please?

THE COURT: Briefly, if you wish, yes.

MR. KERSHEK: Your Honor, on behalf of the defendants Elmer Geraghty, Claire Geraghty and Evelyn Leonard at this time I'm making two requests of the Court. My first request is for an order of this Court permitting these defendants and our law firm to obtain copies of the bid. We're particularly interested in the purchase price in these bids for purposes perfecting our appeal. Secondly, in my second request I'm requesting an order permitting these defendants and our office to obtain copies of the transcript of the closed proceeding held in your chambers where the representative, the attorney for Vulcan met with you along with other representatives from Payne & Dolan and the receiver and Attorney Weisfeldt.

MR. SCHULZ: May it please the Court, I would like to make a brief statement reiterating our objection to the imposition of the receivership as a preclusion of this corporation continuing to be represented in this proceeding by an attorney of its choice. I made that objection in writing and had it delivered to the Court yester-

day. The Court has not directly ruled on that. It's ruled by implication against the interests of the corporation in that respect. I will point out for the record that this is a situation in which the requisite appellate record that would be required cannot be laid by an attorney-receiver who is in conflict of interest with the majority shareholders of the corporation on these very points. It seems to me to be unethical and illegal for the receiver to accept an assignment in that regard when this corporation as controlled by these majority shareholders has already objected to his appointment, asked the Court of Appeals to stay his appointment, filed a supervisory writ asking for stay of his appointment. Now this corporation is being told it cannot participate with the attorney who has done this sort of appellate work on its behalf as being supplanted by the man whose own appointment it has so vigorously resisted.

THE COURT: You're not being supplanted in the appellate court.

MR. SCHULZ: We can't make the objections by a man who is not in a position to object to his own appointment or his own actions.

THE COURT: The appellate court saw fit to stay only one portion of this Court's order.

MR. SCHULZ: So far.

THE COURT: Well, so far. Essentially what's at stake here is a basic and fundamental theory and practice in the courts of these United States and in this state, that is, whether a settlement entered into between parties on a court record, all parties being represented by counsel, should be given any respect or recognition. That's a matter that the appellate court will have to decide. My recollection of the law in Wisconsin of that type of a settlement, barring any allegations of fraud or what have you, is a settlement which the courts will back up.

MR. SCHULZ: Judge, for the record then may I say that the corporation as constituted by the controlling shareholders and its present board of directors objects to each and every action taken by this receiver hereafter.

THE COURT: You have your record. Now,

claim it is constitutionally guaranteed a certain result, but only that it has a right of access to the appellate court system for the purpose of seeking relief under the law of mistake, inadvertance, etc., as spelled out in Section 806.07 of the Wisconsin Statutes. When viewing the activities of the trial court and the receiver, there is no doubt that they were calculated to cut off the petitioner's appellate rights. The Supreme Court, we believe, has a responsibility to reverse the decision of the Court of Appeals and send a clear message condemning such conduct.

B. Violation of Federal Due Process

In addition to offending the Wisconsin constitution, the maneuvers by the receiver and the trial court violate the Fourteenth Amendment of the United States Constitution which states in part that " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . " The requisite state action necessary to invoke this amendment is present, since the Milwaukee County Circuit Court certainly constitutes an arm of the state, and the receiver, Theodore J. Hodan, is an officer of that court, according to *Milwaukee & M.R. Co. v. Souter,* 69 J.S. 510 *(1864) and Bartelt v. Smith* 145 Wis. 31, 129 N.W. 782 (1911).

While the language of the Fourteenth Amendment's due process clause is spacious and undoubtedly meant to be so, the thrust of the interpretive quest has revolved around the question of how much process is due a person, or if enough process has been afforded, rather than whether any process is due a litigant. Cases such as *Duncan v. Louisiana,* 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968) and *Adamson v. California,* 332 U.S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903 (1947), typify the struggle which the Court has had in determining the extent of the process due. Although the approaches proposed as answers in this dynamic have included the total incorporation of the Bill of Rights, selective incorporation of those rights, and the more nebulous selection of those rights necessary for fundamental fairness, the basic assumption underlying all of this debate is that all persons, whether real or legal, are entitled to a system of due process when taking of life, liberty, or property is going to occur.

In the case at hand, the petitioner is not asking for any additions or alterations in the appellate due process afforded by

the Wisconsin legislature; no question as to the sufficiency of this process has been raised. Instead, Franklin Stone Products, Inc., merely wishes to avail itself of that process which the legislature has delineated for appeals cases, and the corporation has been forced to petition this Court to exercise that right. Franklin Stone Products, Inc., like any other litigant, has a fundamental right to use the due process of this state in seeking its legal remedy. To deny access to that process robs the petitioner of its Fourteenth Amendment right. Clearly, the Supreme Court must strike down the decision of the lower court as unconstitutional and reaffirm the principles of due process that form the bedrock of a nation governed by law. In view of the substantial state and federal constitutional issues present in this case, the petitioner hopes that the Court grants this petition and corrects the abuses below.

II. DEVELOPMENT OF THE LAW

A. Filling of Legal Void

A search of the case law in Wisconsin concerning receivership reveals very little about the bounds of a receiver's and trial court's powers in dissolution situations where the receiver is appointed against the wishes of the corporation and said receiver attempts to discharge corporate counsel who is vigorously prosecuting the appeal on behalf of the corporation. The majority of the cases in this area deal with the question of whether it was proper to appoint a receiver in a particular situation. While case law has indicated that a receiver has the duty to pay taxes on property entrusted to him and to procure authority from the Court to borrow funds to pay taxes, according to *Minneapolis, St. P. & S. S. M. Ry. Co. v. Henry,* 215 Wis. 668, 255 N.W. 896 (1934), and the duty to exercise diligence in keeping down expenses on property entrusted to him, as held in *Speiser v. Merchants' Exch. Bank,* 110 Wis. 506, 86 N.W. 243 (1901), there is nothing even remotely dealing with the situation at hand. Perhaps nothing so violative

JOHN A. HOLZHAUER
MAI-SREA-CRE
REALTOR APPRAISER
5823 West Appleton Ave.
Milwaukee, Wisconsin 53210
Area Code 414-873-5550

February 25, 1983

FRISCH, DUDEK & SLATTERY, LTD.
825 North Jefferson Street
Milwaukee, Wisconsin 53202
ATTN: Mr. Dennis Grzezinski

RE: Franklin Stone Products, Inc.
7220 South 68th Street
Franklin, Wisconsin

Dear Mr. Grzezinski,

At your recent request, we have made an inspection and investigation into the above captioned property. The purpose of this was to express our opinion as to its market value and to comment on the land value reported in SPIEGEL-OLSON & ASSOCIATES, dated May 21, 1982 found on page 10 which is as follows:

RAWSON AVENUE	24.529 AC @ $4,500/AC =	$110,381
SOUTH 51ST STREET	60,275 AC @ $4,500/AC =	271,238
SOUTH 68TH STREET	81.721 AC @ $2,000/AC =	163,442
TOTAL	166.525 AC @ $3,273/AC =	$545,061

The main objective of reviewing this land valuation was to acertain if this value took into account the substantial limestone deposits on the subject property.

In order to arrive at a basis for our opinion, we have reviewed the following land sales in Franklin since 1980:

1980		
6630 S. Lovers Lane Rd.	$600,000 -	59.42 AC or $10,098/AC
4301 W. Rawson Ave.	$190,000 -	20.00 AC or $ 9,500/AC
76th & Forest Hill	$100,000 -	27.95 AC or $ 3,571/AC
9941 W. Rawson Ave.	$100,000 -	10.19 AC or $ 9,813/AC
Hwy 100	$300,000 -	72.00 AC or $ 4,166/AC

1981			
6801 S. 27th St.	$ 95,000 -	20.00 AC or	$ 4,750/AC
9280 W. Loomis Rd.	$275,000 -	33.34 AC or	$ 8,248/AC
8800 S. 116th St.	$ 60,000 -	26.3 AC or	$ 2,281/AC
1982			
8525 Hawthorne La.	$ 48,000 -	4.00 AC or	$12,000/AC
8400 S. 116th St.	$ 49,000 -	81.6 AC or	$ 2,634/AC
TOTALS	$1,817,000 -	291.8 AC or	$ 6,228/AC

From these sales, it would become quite apparant that the SPIEGEL-OLSON Land Values did not take into consideration the limestone deposits. Even their values of $4,500 per acre for +/− 84 acres and $2,000 per acre for +/− 81 acres would appear too low compared to the above sales.

At this point, we do not have test borings of the site and cannot make an accurate determination as to the actual limestone deposits. However, Mr. Elmer Geraghty has informed us, based on his borings, that there are approximately 100 acres that have at least a 200' limestone subsoil condition. Based on previous total acreages, this would leave 66.525 acres without a deposit. This excess land is primarily located at the south end of the property and to some extent along its east and west property lines. We understand that the deposit does extend to Rawson Avenue.

Based on the following:

1) One square foot of limestone equals 93 lbs.
2) 15 bushels of limestone to the ton.
3) One yard of limestone equals 2500 lbs or 1¼ ton.
4) 43,560 square feet to the acre.

We can now at least make an estimate as to the amount of deposit.

100 Acres x 43,560 SF =	4,356,000	surface SF
	X 200	feet deep
	871,200,000	square feet
	X 93	lbs. per SF
	81,021,600,000	lbs.
	÷ 2,500	lbs. per yard
	32,408,540	yards

The quarry itself started in operation in 1951 and since that time has averaged the following yearly productions:

1951-61 — 2,097,197 yards or 209,719 average per year
1962-72 — 3,026,992 yards or 302,699 average per year
1973-98 — 2,113,380 yards or 211,338 average per year

Thus, we could project from past performance an annual quarry sale of approximately 215,000 yards per year which, when divided into the amount of deposits (32,408,540 yards) would indicate a quarry life of 32,408,540/215,000 or 150.74 years.

It is also a further possibility that the quarry itself could become a future solid waste landfill site. This in turn, would produce a fill revenue as well as quarry revenue.

Presently, the current quarry charge is $3.75 per ton for the large stone and $4.00 per ton for the smaller stone.

Assuming a net return of $ .50 per yard for fill and $ .75 per ton for stone, we would arrive at the following net income over the next 150 years or:

Fill — 215,000 years X $ .50 = $107,500
Stone — 215,000 ÷ tons/yard
172,000 tons X $ .75 = 129,000
$236,500 per year

Applying to this the Inwood Factor or the present day worth factor for the right to receive $236,500 net per year for the next 50 years, discounted at 8% of 12,233 will give us a present day worht of this income stream or:

$236,000/Yr X 12,233 = $2,893,104
Say $2,895,000

Based on the foregoing, it would be our opinion, subject to the verificaton of the assumptions and limitations set forth that the present day value for the deposits and void would be:

"TWO MILLION EIGHT HUNDRED NINTEY-FIVE THOUSAND DOLLARS"
($2,895,000.00)

We have no interest in this property whatsoever, either present or prospective, nor is our fee contingent upon the value submitted. The property has been evaluated under circumstances of certain typical financing terms and conditions, as having merchantable title and no responsibility is assumed for legal matters, questions of title, survey, easements, encroachments or conditions not exposed to view.

Respectfully Submitted,

/s/Kingston F. Swallow, Appraiser

KINGSTON F. SWALLOW,
Appraiser
Did physically inspect the property

/s/John A. Holzhauer, MAI, SREA, CRE

JOHN A. HOLZHAUER,
MAI, SREA, CRE
Review Appraiser - Did not physically inspect the property

KFS/JAH/jm

SPIEGEL-OLSON & ASSOCIATES
Real Estate Consultants
7332 West State Street Milwaukee, WI 53213 Phone (414) 771-4690

May 21, 1982

Quarles & Brady
780 North Water Street
Milwaukee, Wisconsin 53202

Attention: Mr. Frank Daily

Gentlemen:

Subject: Franklin Stone Products,Inc.
7220 South 68th Street
Franklin, Wisconsin

In accordance with your verbal authorization, I have prepared the following report for purposes of expressing an opinion of the Fair Market Value of the Business Enterprise as described and exhibited throughout the subsequent pages.

The term "Fair Market Value" as used herein is defined as being the amount of money which the business enterprise would exchange for between a willing buyer and willing seller, each with reasonable knowledge of all the relevant facts, and with equity to both.

The "Enterprise" is a combination of tangible and intangible elements that make a producing unit, and includes the current assets and liabilities, but none of the long-term obligations, and takes into consideration the reputation, management, and type of products sold.

The property under appraisement comprising the business enterprise, known as Franklin Stone Products, Inc., consists of substantially 166.53 acres of land together with related improvements in the mining and crushing of stone. Valuation includes the real estate, the fixed and movable equipment, and goodwill, if any. In arriving at the final conclusion of value, consideration is given to:

1) The continuation of the business operation at this location,
2) The extent, age and character of the physical assets employed in the business operation,
3) The management, supervision and employees of Franklin Stone Products, Inc. in maintaining the operation,

4) An analysis of the historical business operation and a study of its future potential, and
5) The earnings capacity of the enterprise appraised and the conversion of such income into value.

The report comprises:

1) This letter which outlines the extent of the investigation and summarizes the conclusion of value,
2) A narrative section treating in detail the study, comprising a description of the property, a discussion and development of the valuation in formulating an opinion of value, and a conclusion of value, and
3) An exhibit section which includes illustrative and explanatory data.

Based upon the investigation as outlined, it is my opinion that, as of 1 January 1982, the Fair Market Value of the business enterprise is equitably represented in the amount of:

EIGHT HUNDRED THOUSAND DOLLARS ($800,000.00).

I have made no investigation of, and assume no responsibility for the Title to the real estate or equipment included in the concluded value. Certain unaudited financial data concerning the subject facility has been accepted without further investigation as fairly representing the financial position of the enterprise.

Employment in and compensation for making this report are in no manner contingent upon the value reported, and I certify that:

1) I have no present or contemplated future interest in the property that is the subject of this report.
2) I have no personal interest or bias with respect to the subject matter of this report or the parties involved.
3) To the best of my knowledge and belief the statements of fact contained in this report, upon which the analyses, opinions and conclusions expressed herein are based, are true and correct.
4) The report sets forth all of the Limiting Conditions affecting the analyses, opinions and conclusions contained in this report.
5) This appraisal report has been made in conformity with and is subject to the requirements of the Code of Professional Conduct of the American Institute of Real Estate Appraisers

of the National Association of Real Estate Boards.

6) No one other than the undersigned prepared the analyses, conclusions and opinions concerning the enterprise that are set forth in this report.

Respectfully,

/s/Walter H. Spiegel, MAI, ASA

Walter H. Spiegel, MAI, ASA
Spiegel-Olson & Associates

WHS/jsz